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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE VARIANCE PERMIT DENIED AND A SUBSTANTIAL DEVELOPMENT PERMIT GRANTED BY THE CITY OF BREMERTON TO ROBERT H. GREEN,	
ROBERT H. GREEN, Appellant, v. CITY OF BREMERTON and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 81-37 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

This matter, the request for review of the City of Bremerton's denial of a variance permit and granting of a substantial development permit, was brought before the Shorelines Hearings Board: Nat W. Washington, Chairman, Gayle Rothrock, Ronald J. Holtcamp and A. M. O'Meara, Members, on February 18, 1982, in Lacey, Washington. Administrative Law Judge William A. Harrison presided.

Appellant, Robert H. Green, appeared by his attorney, Lee Olwell. Respondent City of Bremerton was represented by M. Karlynn Haberly, Assistant City Attorney. Respondent Department of Ecology was represented by Wick Dufford, Assistant Attorney General. Reporter Betty Koharski recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. Having heard the testimony, having examined the exhibits, having heard and read argument, and being fully advised, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter concerns a site, in Bremerton, bordered on its north and east sides by the waters of Port Washington Narrows, and on the west by Snyder Avenue. Appellant, Robert H. Green, purchased the site in 1975 and short platted it into two lots in 1978. In 1979, appellant proposed to construct a single family home for his own use on one of the lots. A shoreline variance permit for that proposal was reviewed in our case, SHB No. 79-29 (1979) and found to be unnecessary at the time of its issuance because the rule from which variance was sought had not yet taken effect.

Since then, appellant has re-divided the site so that the present two lots are different in size from those existing formerly.

II

In May, 1981, appellant applied to the City for a shoreline substantial development permit to construct a single building spanning

both lots and containing four residential units. Appellant's application sought two variances from Appendix D of the Bremerton Shoreline Master Program (BSMP): 1) a variance relating to height which is no longer an issue and 2) a variance to allow the building to be 15 feet from the ordinary high water mark on the site's north end. The setback provision concerned states:

> Every building (excluding uncovered and unenclosed decks, platforms, steps and porches shall have a minimum twenty-five (25) foot setback from the ordinary high water mark.

Appellant sought the setback variance "as a matter or principle" to increase the spaciousness of the proposed residential units.

III

Because the area is zoned for duplexes, appellant changed his proposed development to consist of two duplexes, one on each lot of the site. As proposed, each of the four units would contain an average of 1600-1800 square feet.

IV

The City issued a substantial development permit to appellant in August, 1981. In doing so, it applied the provision of the BSMP, Appendix D relating to lot width coverage which provides, in pertinent part:

> The greatest width of any building shall not exceed sixty percent (60%) of the width of the lot as measured at the proposed front or rear building line, whichever is less...

This lot width coverage rule had no effect on one duplex, but reduced

the allowable width of the other duplex. The rule would, however, allow construction of a third building on the lot of the reduced duplex.[1] The setback variance was denied. As a result, the substantial development permit allows two duplexes and an accessory building accommodating four units of 1200-1500 square feet each.

V

The history of Appendix D of the BSMP, which contains both the setback and lot width provisions at issue, is as follows:

1. In September, 1977, the City published newspaper notice of its intention to adopt its initial BSMP. At that time the BSMP, as proposed, did not include specific provisions relating to setback and lot width coverage in residential areas. The notice stated:

> Notice is hereby given that the City Council of the City of Bremerton, Washington, will hold a public hearing on Wednesday, September 28, 1977, at 10:30 a.m. in the Council Chambers of City Hall, Bremerton, Washington, to review and take public testimony on the proposed Bremerton Shoreline Management Master Program. This hearing will lead to the adoption of the program.
>
> Interested persons are invited to attend the hearing and present their views, or written comments will be accepted prior to the hearing at the City Clerk's Office, 239 Fourth Street, Bremerton, Washington. The proposed Bremerton Shoreline Management Master Program contains goals, policies and regulations for the development of Bremerton shorelines. The Master Program also outlines permit procedures, discusses natural systems and classifies Bremerton shorelines as either Residential, Commercial, or Conservancy.

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1. Such a third building would "overlap" the duplex so that neither building is wider than 60% of the lot concerned. This lot width coverage rule has been similarly applied to other shoreline developments.

The City of Bremerton is required by the Washington State Shoreline Management Act of 1971 to develop and adopt a Shoreline Management Program.

2. At the City Council's public hearing on September 28, 1977, the City received public comment calling for the addition of specific provisions relating to setback and lot width coverage in residential areas. The City Council therefore continued the hearing for one week, instructing the City Planning Director to consider the public comment and return with a recommendation.

3. At the City Council's continued public hearing a week later, October 5, 1977, the City Council agreed that the BSMP should include a 28 foot setback and that lot area should only be covered 60% in width. These rules were added to the proposed BSMP, with others, as Appendix D. The BSMP with Appendix D was then adopted by Resolution 1736 on October 5, 1977.

4. By City Council Resolutions 1769 and 1770 of May 16, 1978, the setback provision of Appendix D was amended to 25 feet.

5. Following letter approvals, the State Department of Ecology (DOE) approved the BSMP by permanent rulmaking under the Administrative Procedure Act, chapter 34.04 RCW on January 30, 1980. WAC 173-19-2601. Appellant has not proved that DOE failed to comply in any respect with the public notice or comment requirements of the Administrative Procedure Act.

VI

The substantial development permit issued to appellant by the City

contains seven conditions, several with sub-parts. Condition 5(a) requires compliance with attached requirements of the Planning Department Advisory Report. Paragraph B.2. of that report states, in part:

> Engineering Department. No formal easements found for the two existing City outfalls that cross the northerly property limits. Recommend that formal easements be granted for the two existing outfalls that cross the northerly property limits.

VII

Appellant, Robert H. Green, requests review of the terms of the substantial development permit granted and of the setback variance denied.

VIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

The City's denial of appellant's request to vary the setback from 25 feet to 15 feet was correct. The standard governing such a variance request is prescribed by WAC 173-14-155 of the Department of Ecology (DOE) which states:

> WAC 173-14-155 Minimum standards for conditional use and variance permits. Pursuant to RCW 90.58.100(5) and 90.58.140(3), the criteria contained in WAC 173-14-140 and 173-14-150 for shoreline conditional use and variance permits shall constitute the minimum criteria for review of these permits by local government and the department. Local government and the department may, in addition, apply the more

restrictive criteria where it exists in approved and adopted master programs.

The approved and adopted master program (BSMP) does contain a more strictive criteria than the minimum criteria of the DOE. This is so because the BSMP variance criteria,[2] unlike the DOE criteria,

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2. BSMP, Part 3, Page 10:

Variances

A variance is the means by which an adjustment is made in the application of the regulations to the use of a particular piece of property, which property, because of special circumstances applicable to it, is deprived of the use thereof or of privileges commonly enjoyed by other properties in the same environment, and/or natural system and which adjustment remedies the disparity in privileges.

The applicant must identify each provision in the regulations for which he desires a variance. The applicant must show the Planning Department that if he complies with the provisions he cannot make any reasonable use of his property. The fact that he might make a greater profit by using his property in a manner contrary to the intent of the program is not a sufficient reason for a variance.

A variance will be granted only after the applicant can demonstrate the following:

1. The hardship which serves as the basis for granting the variance is specifically related to the property of the applicant and does not apply generally to other property in the vicinity in the same environment or natural system;

2. The hardship results from the application of the requirements of the Shoreline Management Act and Master Program and not from deed restrictions or the applicant's own actions;

3. The variance, if granted, will be in harmony with the general purpose and intent of the Master Program;

4. Public welfare and interest will be preserved; if more harm will be done to the area by granting the variance than would be done to the applicant by denying it, the variance shall be denied.

requires the applicant to carry a heavy threshold burden of proving that without a variance, he cannot make any reasonable use of his property. See also, Pier 67, Inc. v. Seattle and DOE, SHB 81-13 (1981). Appellant has failed to prove that if he complies with the prescribed 25 foot setback, he cannot make any reasonable use of his property. The evidence shows that appellant is allowed to use his property for residential, multi-family or single family, development. We therefore must affirm the action of the City in denying the setback variance application.

II

Appellant urges that his setback variance application should be governed by the DOE variance criteria, WAC 173-14-150, because this is the standard applied by the City in its consideration of the variance request. To do so would amount to estoppel against the City. Estoppel against a municipality is proper only if the exercise of its governmental powers will not be impaired thereby. Finch v. Matthews, 74 Wn.2d 161, 443 P.2d 833 (1968). Estoppel should therefore not be applied in this case to allow application of the DOE standard in disregard of the standard adopted by the legislative body of the City.

Moreover, assuming for the sake of argument that the DOE variance criteria,[3] WAC 173-14-150, were applicable, appellant's request does

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3. The DOE variance criteria provides, in pertinent part:

> WAC 173-14-150 REVIEW CRITERIA FOR VARIANCE PERMITS. The purpose of a variance permit is strictly limited to granting relief to specific bulk, dimensional or performance standards set forth in the

applicable master program where there are extraordinary or unique circumstances relating to the property such that the strict implementation of the master program would impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020.

(1) Variance permits should be granted in a circumstance where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances extraordinary circumstances should be shown and the public interest shall suffer no substantial detrimental effect.

(2) Variance permits for development that will be located landward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030(2)(b), except within those areas designated by the department as marshes, bogs, or swamps pursuant to chapter 173-22 WAC, may be authorized provided the applicant can demonstrate all of the following:

(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by the master program.

(b) That the hardship described in WAC 173-14-150(2)(a) above is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions.

(c) That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment designation.

(d) That the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief.

(e) That the public interest will suffer no substantial detrimental effect. (Emphasis added.)

Bremerton may amend its variance requirements to conform to the less strict standards of DOE if Bremerton choses to do so.

-END OF FOOTNOTE-

not entitle him to variance under that criteria either. The strict application of the 25 foot setback does not preclude or significantly interfere with residential use of the property (a reasonable use). The setback permits development of two duplexes with each of the four units having a reasonable interior size. The setback would also permit fewer, but more spacious units. Appellant's opportunity to develop two duplexes with more spacious units in the event a setback variance were granted is not a proper basis for variance under WAC 173-14-150.[4]

III

Appellant urges that Appendix D of the BSMP, containing the setback and lot width coverage provisions, is legally unenforceable because Appendix D was not given required public notice prior to its adoption. Respondent, DOE, urges that we have no jurisdiction to review the procedure by which a pertinent master program provision was adopted in a review of a shoreline permit. We conclude that we have jurisdiction. DNR v Kitsap County, SHB 78-37 (Order on Pre-Hearing Motions, 1979) and Green v. Bremerton SHB 79-29 (1979).

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4. We also take official notice that in the disposition of our prior case, Green v. Bremerton, SHB No. 79-29, we found as fact that:

> The construction of appellant's proposed residence forward of the 25 foot setback line would reduce the view of the water from the residence west of the site, across Snyder Avenue. Finding of Fact III.

This is the same setback which appellant now seeks to reduce by variance.

With regard to the public notice required for local adoption of a shoreline master program DOE guidelines provide, at WAC 173-16-040(h)(e), that such notice shall include:

> (i) Reference to the authority under which the rule is proposed
> (ii) A statement of either the terms or substance of the proposed rule or a description of the subjects and issues involved.
> (iii) The time, place and manner in which interested persons may present their views thereon (as stated in RCW 34.04.025).

In this case, a time place and manner for interested persons to present their views was provided in the form of a public hearing before the City Council on September 28, 1977. Appellant urges that the setback and lot width coverage provisions which arose from public comment at the hearing should have precipitated new public notice that such provisions had been suggested. We disagree. The orginal public notice published prior to the public hearing (Finding of Fact V, above) stated the subjects and issues involved in adopting the BSMP. Residential setback and lot width coverage are specific considerations within the bounds on those announced subjects and issues. The notice provided by the City therefore gave appellant an opportunity and responsibility to present his views or dispute the views of others at the public hearing on September 28, 1977, or within the week afterwards preceeding adoption of the BSMP. The City met the public notice requirements of WAC 173-16-040(h)(i).

With regard to the public notice required for DOE approval of the BSMP, RCW 90.58.120 requires adherence to the provisions of the

Administrative Procedure Act, chapter 34.04 RCW. As we found in Finding of Fact V, appellant has not proven any failure of DOE to comply with the public notice requirements of chapter 34.04 RCW. Neither has appellant proven any failure of DOE to comply with the public notice requirements of RCW 90.58.120(1) or (2) relating to newspaper publication and public inspection of the BSMP. The disputed Appendix D was an adopted portion of the BSMP by the time of DOE's approval (Finding of Fact V).

We conclude that the challenged provisions of Appendix D are legally enforceable so far as the challenges made to the adoption procedure adoption are concerned. Without diminishing that conclusion, we nevertheless observe that the lot width coverage provision of Appendix D should be reviewed by the City, to determine whether two or more "overlapping" buildings is the intended result of that rule. The City, in its legislative capacity, is the proper authority to conduct that review in this case rather than this Board.

IV

Appellant contends that conditions in the shoreline substantial development permit issued by the City are unlawful in that they require compliance with non-shoreline law. Implicit in the power of any local government to grant a shoreline substantial development permit is the power to reasonably condition its use. Weyerhaeuser Co. v. King County, SHB No. 155 (1975). See State v. Crown Zellerbach, 92 Wn.2d 894, 602 P.2d 1172 (1979). The reasonableness of conditions is not hindered merely because they derive from local ordinances or other

sources aside from the BSMP. Rather, the test of reasonableness should be whether the conditions of a shoreline substantial development permit further the policy of the Shoreline Management Act, RCW 90.58.020 or aid the implementation of the local shoreline master program. With one exception appellant has not proven that any of the subject conditions are unreasonable.

The exception is the language of conditon No. 5(a) quoted in Finding of Fact VI, above, which requires the apppellant to grant an easement for existing City sewer outfalls which cross the site in question. Neither the sewer outfall nor their route across appellant's site result from the proposed development. The conveyance of an easement required by the condition does not further either the policy of the Act nor aid the implementation of any provision of the BSMP. The outfall easement requirement of condition No. 5(a) is unreasonable and should be stricken.

V

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The shoreline substantial development permit issued by the City of Bremerton to Robert H. Green is affirmed, provided, however, that conditon No. 5(a) as it relates to granting of easements for existing sewer outfalls (as quoted in Finding of Fact VI above) is stricken. The City of Bremerton's denial of Robert H. Green's request for setback variance is affirmed.

DATED this 26th day of May, 1982.

SHORELINES HEARINGS BOARD

NAT W. WASHINGTON, Chairman

GAYLE ROTHROCK, Vice Chairman

RONALD J. HOLTCAMP, Member

A. M. O'MEARA, Member

WILLIAM A. HARRISON
Administrative Law Judge